Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All ER 976 it was ruled that where a bank had given a performance guarantee it was required to honour it according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. Both cases had propounded that a performance bond was similar to a confirmed letter of credit. Consequently, the issue here of having to resort to arbitration does not implicate the plaintiff and certainly cannot be raised in these proceedings.

Much had been said about the plaintiff not replying to the allegations raised by the sixth defendant in his affidavit filed on 30 August 1992 and therefore deemed to be admitted following *Overseas Investment Private Limited v. Anthony William O'Brien & Anor.* [1988] 2 CLJ 238 but all what that affidavit has attempted to do was to reply to the plaintiff's affidavit dated 22 September 1990. In the interim period, the learned Senior Assistant Registrar had decided on the matter on the 30 May 1991 and had decided in favour of the plaintiff. It was therefore my view that there was no necessity for the plaintiff to reply to the affidavit in the circumstances.

As far as the plaintiff was concerned, they had to pay the Government of Malaysia on demand and it was not their duty to question the terms of the contract between the Government of Malaysia and the defendants. Further, the Director of Public Works, Sarawak had acted for and on behalf of the Government of Malaysia in all the documents and correspondence and there was no necessity or reason for the plaintiff to question his authority in his capacity as agent for the Government of Malaysia. Consequently, all the issues raised by the appealing defendants here may be relevant triable issues between them and the Goverment of Malaysia but it certainly does not concern the plaintiff in their claim. I had therefore accordingly dismissed the two appeals with costs.

LEE HENG KOOI

v.

PUBLIC PROSECUTOR

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL REVISION NO. 43-16-92]
31 OCTOBER 1992

CRIMINAL PROCEDURE: Jurisdiction - Subordinate Courts - Section 85 of Subordinate Courts Act 1948 - Whether First Class Magistrate's Court can try offences which also provides whipping as punishment - Section 397 of Penal Code.

INTERPRETATION OF STATUTES: Construction of ss. 85 and 87 Subordinate Courts Act - Scope of s. 40(1) of Interpretation Act 1967 - Whether s. 40(1) ought to be invoked only in respect of procedural or administrative matters.

This was a criminal revision referred to the High Court under s. 323 of the Criminal Procedure Code by Karpal Singh, the defence Counsel for the applicant on the issue whether s. 85 of the Subordinate Courts Act 1948 confers upon the First Class Magistrate's Court, jurisdiction to try offences which also provide for a sentence of whipping.

This point was raised as a preliminary issue at the Magistrate's Court at the trial of the applicant who was charged for an offence under s. 397 of the Penal Code which also provides for a sentence of whipping. The learned Magistrate had dismissed the preliminary objection.

Held:

[1] Section 87 of the Subordinate Courts Act 1948 which provides that a Magistrate may pass any sentence allowed by law not exceeding whipping of 12 strokes (in combination with any of the other sentences) should be read in conjunction with the said opening phrase in s. 85 of the said Act. Thus, the legislature had obviously intended, by the phrase "Subject to limitations contained in this Act, a First Class Magistrate shall have jurisdiction to try..." to mean "Subject to the sentences within competence of the First Class Magistrate to pass any sentence (*inter alia*) of whipping of up to 12 strokes, a First Class Magistrate shall have jurisdiction to try...". This would make for a more comprehensive interpretation of s. 85, as encompassing within its ambit, offences which also provide for a sentence of whipping.

[2] Section 85 of the Subordinate Courts Act 1948 also provides that a First Class Magistrate shall have jurisdiction to try offences under ss. 392 and 457 of the Penal Code carrying up to fourteen years imprisonment, notwithstanding that these two penal sections clearly provide for a sentence of whipping, besides imprisonment.

[3] As s. 87 of the Subordinate Courts Act 1948 clearly confers powers to a First Class Magistrate to impose (*inter alia*) a sentence of whipping of up to twelve strokes, jurisdictional powers to try offences which allow for whipping must obviously implied by virtue of s. 40 of the Interpretation Act 1967.

[4] The Magistrate in the current case under revision was clearly acting within his jurisdiction in trying the offence under s. 397 of the Penal Code; so indeed, had all the Magistrates who had tried offences carrying the penalty of whipping since 1948.

[First Class Magistrate has jurisdiction to try the offence under s. 397 of Penal Code]

Case referred to:
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1990] 2 MLJ 297 ***(not foll)***

For the applicant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Ishak bin Yusoff, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:
This is a matter referred to the High Court by Mr. Karpal Singh for revision under s. 323 of the Criminal Procedure Code on a preliminary issue raised by him in the Magistrates' Court that s. 85 of the Subordinate Courts Act 1948 (s. 85 of the said Act) does not confer upon the First Class Magistrates' Court, jurisdiction to try offences which also provide for a sentence of whipping.

A preliminary issue was raised to the Honourable Magistrate (and was dismissed) that by virtue of the aforesaid, the Honourable Magistrate is not clothed with any jurisdiction to try the learned Counsel's client who was also charged under s. 397 of the Penal Code which provides for whipping.

It was submitted that although s. 87 provides for whipping up to twelve strokes the opening phrase in s. 85 'subject to **limitations** contained in this Act' meant whipping must first be provided for in s. 85 before the **limitation** of twelve strokes in s. 87 could arise. It was also submitted that s. 87 purports to **extend** punishment of whipping to a Magistrates' Court without providing for it in s. 85. This, it was contended, was clearly illegal.

Section 85 of the Act clearly concerns the criminal jurisdiction of First Class Magistrate whereas s. 87 deals with sentences within the competence of the First Class Magistrate. Section 85 of the Act provides that a "First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years' imprisonment or ..." without the words "with or without whipping" inserted after the words "ten years imprisonment".

Though s. 85 does not appear to be an immaculately or felicitously crafted piece of legislation, yet I am of the view that under the accepted canons of construction of Statutes, it is impermissible to employ one limb of a particular provision in a statute to impugn another limb of the same provision. Inconsistencies, if any, of the two limbs of a particular provision only makes for lack of clarity of that particular provision and nothing more. In such cases other provisions in the same or other Acts could and ought to be invoked to assist in the interpretation of the nebulous provision.

As such, we are precluded from holding that the absence of the words "with or without whipping" in s. 85 should or even could be construed as one of the limitations as expressed in the opening phrase of the same s. 85.

In regard to Mr. Karpal Singh's contention that s. 87 purports to extend punishment of whipping to the First Class Magistrate without providing for it in s. 85, it is my view that the issue for judicial determination is not a matter of extension of punishment or jurisdiction but rather, how do we interpret s. 85, and whether s. 87 could assist.

In my considered opinion, s. 87 of the Act which provides that a Magistrate may pass any sentence allowed by law not exceeding whipping of 12 strokes (in combination with any of the other sentences) should be read in conjunction with the said opening phrase in s. 85. Thus, the legislature had obviously intended, by the phrase "Subject to limitations contained in

this Act a First Class Magistrate shall have jurisdiction to try ..." to mean "**Subject to the sentences within competence of the First Class Magistrate to pass any sentence *(inter alia)* of whipping of up to 12 strokes**, a First Class Magistrate shall have jurisdiction to try ...". This would make for a more comprehensive interpretation of s. 85, as encompassing within its ambit, offences which also provide for a sentence of whipping.

In this context it is significant to note that s. 85 also provides that a First Class Magistrate shall have jurisdiction to try offences under s. 392 and 457 of the Penal Code carrying up to 14 years imprisonment, notwithstanding that these two penal sections clearly provide for sentence of whipping, besides imprisonment.

My above interpretation of s. 85 of the Subordinate Courts Act 1948 is further fortified by the provisions of s. 40(1) of the Interpretation Act 1967, which states that where a written law confers a power on any person to do or enforce the doing of any act or thing, **all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing**. In the result, as s. 87 clearly confers power to a First Class Magistrate to impose *(inter alia)* a sentence of whipping of up to 12 strokes, jurisdictional powers to try offences which allow for whipping must obviously be implied by virtue of s. 40, of the Interpretation Act.

I do not agree with Mr. Karpal Singh that s. 40(1) of the Interpretation Act ought not to be invoked to interpret important issues such as jurisdiction, but only in respect of procedural or administrative matters. On the contrary, the clear wording of this provision, being "where a written law confers a power on any person to do or ..." besides "or enforce" is wide enough to bring within its ambit all laws including laws governing jurisdiction.

Though Mr. Karpal Singh had today cited a further authority being the decision in *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297 to advance the principle that s. 40 of the Interpretation Act is inapplicable, as matters such as jurisdiction should be expressly, clearly and unequivocally provided in s. 85 of the Subordinate Courts Act 1948, yet if the opening phrase in s. 85 is read in conjunction with the clear provision for whipping in s. 87 of the said Act, it cannot be denied that the legislature had shown clear and unequivocal intention to also cloth the First Class Magistrate with jurisdiction to try offences such as under s. 397 of the Penal Code notwithstanding the whipping penalty being provided therein.

For the purposes of interpretation of s. 85 of the Act, I would have been almost persuaded by Mr. Karpal Singh's eloquent submission if, speaking hypothetically, offences which carry a whipping sentence only, had existed in the Penal Code and s. 85 of Subordinate Courts Act talks of offences punishable with fine only (there being such offences in the Penal Code) but omits to mention offences punishable with whipping only.

It is unnecessary to call the learned DPP to reply.

For the above reasons, I hold that the Magistrate in the current case under revision was clearly acting within his jurisdiction in trying the offence under s. 397 of the Penal Code; so indeed, had all the Magistrates who had tried offences carrying the penalty of whipping since 1948, and I so rule.